Supreme Court, U.S.
FILED
SEP 9 1994
OFFICE OF THE CLERK

No. 94-258

In The

Supreme Court of the United States

October Term, 1994

HOME SAVINGS OF AMERICA, FSB,

Petitioner,

vs.

MARCELLA T. MAYNARD,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeal Of The State of California
Second Appellate District

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE TEXAS SAVINGS AND COMMUNITY BANKERS ASSOCIATION, CONNECTICUT BANKERS ASSOCIATION, COMMUNITY BANKERS ASSOCIATION OF NEW YORK STATE AND CALIFORNIA LEAGUE OF SAVINGS INSTITUTIONS AS AMICI CURIAE IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF OF THE TEXAS SAVINGS AND COMMUNITY BANKERS ASSOCIATION, CONNECTICUT BANKERS ASSOCIATION, COMMUNITY BANKERS ASSOCIATION OF NEW YORK STATE AND CALIFORNIA LEAGUE OF SAVINGS INSTITUTIONS AS AMICI CURIAE IN SUPPORT OF THE PETITION

The Texas Savings and Community Bankers Association, Connecticut Bankers Association, Community Bankers Association of New York State and California League of Savings Institutions (collectively *"amici"*) hereby move, pursuant to Rule 37 of the Rules of this Court, for leave to file the attached brief *amici curiae* in support of the petition for certiorari. Consent to the filing of this brief has been obtained from counsel for petitioner.[1] *Amici* have been unable to secure the consent of counsel for the respondent.

Amici are voluntary trade associations of Texas, Connecticut, New York and California, collectively made up of numerous state and federally chartered thrifts. *Amici*'s federal thrift members, like all federal thrifts, exist under and operate pursuant to the Home Owners' Loan Act, 12 U.S.C. §§ 1461-1470, and implementing regulations of the United States Office of Thrift Supervision, 12 C.F.R. §§ 563.39 and 545.2 (collectively, the "Regulations").

Amici share petitioner's concern about the decision of the California Court of Appeal, which erroneously held that state-law implied contract claims are not preempted by the Regulations. For years, many of *amici*'s member

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[1] A copy of the consent letter is being filed concurrently with the Clerk of the Court.

federal thrifts have operated with the understanding that all employment contracts must be (i) in writing, and (ii) approved by the thrift's board of directors. The Regulations specifically so provide. If, as suggested by the California Court of Appeal's decision, thrifts are to be subjected to the varying implied contract laws of the states, many may suddenly be burdened with myriad obligations they never knew they had. This departure will disrupt the uniform federal rule governing operation of federal thrifts, and place thrifts in certain states at a competitive disadvantage due to the additional obligations arising out of their states' implied contract laws.

Accordingly, *amici* request leave to file this brief, and they urge reversal of the California Court of Appeal.

WHEREFORE, *amici* respectfully request that their motion be granted.

Dated: September 9, 1994

Respectfully submitted,

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BRIEF OF AMICI

INTEREST OF AMICI

Amici, the Texas Savings and Community Bankers Association, Connecticut Bankers Association, Community Bankers Association of New York State and California League of Savings Institutions, urge that the petition of Home Savings of America, FSB, be granted. *Amici* respectfully refer the Court to the description of their interest presented in the motion for leave to file brief, to which this brief is attached.

REASONS FOR GRANTING THE WRIT

This case presents a question that has divided both the state and federal courts. The question is whether federal law – the Home Owners' Loan Act ("HOLA") and its implementing regulations[2] – preempts a federal thrift employee's state-law wrongful-discharge claim, where the claim is based on an alleged implied employment contract forbidden by federal law.

Amici believe that this question was resolved by the United States Office of Thrift Supervision ("OTS") in promulgating certain regulations, exercising authority delegated by Congress in the HOLA. The continuing disarray among the state and federal courts, however, demonstrates that this is an issue on which this Court's guidance is needed.

[2] 12 U.S.C. §§ 1461-1470; 12 C.F.R. §§ 563.39, 545.2.

I.

THERE IS A CONFLICT IN THE STATE-COURT DECISIONS

There is a conflict in the state-court decisions that this Court should resolve.

Amici share petitioner's concern about the decision of the California Court of Appeal. It formerly was the case, uniformly throughout the United States, that the employment relationship was presumptively terminable at will. Now, however, a state jurisprudence of "wrongful discharge" has arisen. A key component of that area of law is the implied employment contract doctrine, in which juries are allowed to decide on a case-by-case basis whether some right of job security existed. The law in this area varies from state to state. *Amicus* Texas Savings and Community Bankers Association notes that its state law is not unlike California's;[3] a jury can find an implied employment contract based on such factors as an oral agreement not to fire an employee without good cause, or documents, such as employee manuals and handbooks, that are not employment contracts (let alone board-approved employment contracts).[4] Roughly similar

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[3] The leading California cases were described and cited in the petition.

[4] *E.g., Morgan v. Jack Brown Cleaners, Inc.*, 764 S.W.2d 825, 826 (Tex. Ct. App. 1989) (at-will relationship may be modified by the parties' agreement, including an oral agreement); *United Transp. Union v. Brown*, 694 S.W.2d 630, 632 (Tex. Ct. App. 1985) (upholding wrongful discharge claim based upon breach of employee manual); *Aiello v. United Air Lines, Inc.*, 818 F.2d 1196, 1199-1200 (5th Cir. 1987) (applying Texas law; personnel manuals and employee handbooks may create enforceable rights limiting an employer's right to terminate at will).

is the law in Connecticut. *Amicus* Connecticut Bankers Association notes that contract claims in that state can be based on employee handbooks and oral statements – again, even without board approval.[5] In New York, state law is somewhat more favorable to employers; yet, even there, *amicus* Community Bankers Association of New York State notes, oral contract claims can arise without the memorial of a writing and certainly without the approval of an employer's board of directors.[6] Thus, all *amici* share the concern expressed by petitioner: that state

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[5] *E.g., Finley v. Aetna Life and Casualty Co.*, 202 Conn. 190, 520 A.2d 208, 213 (1987) (representations in a personnel manual may form the basis of an express or implied contract between employer and employee), *overruled on other grounds*, 626 A.2d 719 (1993); *accord Magnan v. Anaconda Ind., Inc.*, 193 Conn. 558, 479 A.2d 781, 785 (1984) (recognizing that an enforceable promise to discharge employee only for just cause may arise out of employee manual or other representations); *Carbone v. Atlantic Richfield Co.*, 204 Conn. 460, 528 A.2d 1137, 1142 (1987) (whether employment manual gives rise to implied contract is a question of fact to be determined by the trier of fact); *Coelho v. Posi-Seal Int'l, Inc.*, 208 Conn. 106, 544 A.2d 170, 174 (1988) (finding implied-in-fact contract that employee would not be terminated except for just cause based upon oral assurance of job security); *Heller v. Champion Int'l Corp.*, 891 F.2d 432, 435 (2d Cir. 1989) (applying Connecticut law; an implied employment contract claim, based upon employee manuals, company memoranda, performance evaluations and oral assurances, presented a jury question precluding summary judgment).

[6] *E.g., Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441, 445 (1983) (employee who alleged that he was discharged in violation of company handbook stated claim for breach of implied employment contract); *Ohanian v. Avis Rent A Car Sys., Inc.*, 779 F.2d 101, 106-107 (2d Cir. 1985) (applying New York law; an oral agreement for lifetime employment is outside the statute of frauds).

contract law, if it ignores the preemptive force of the federal requirement of a board-approved writing, effectively precludes a thrift's board of directors from exercising the control over its employment obligations envisioned – indeed, required – by federal law. The result: unknown (and unknowable) employment-contract-for-life claims.

While the California court's decision on the preemption issue does not by its terms carry precedential weight in the states in which several of the *amici's* members operate, the issue nevertheless is of national significance. Indeed, there is a conflict in the state-court cases on the subject.[7] California's line of cases on the preemption issue is in accord with New Jersey's rule. *Cole v. Carteret Sav. Bank*, 224 N.J. Super. 446, 540 A.2d 923, 926 (1988) (no preemption; the federal regulations are designed to enforce employment contracts, not preclude their formation). Connecticut seems to be in agreement. *Paris v. Northeast Savings Association*, No. CV 910398144, 1994 Conn. Super. LEXIS 1412, at *24-25 (June 1, 1994) (citing *Cole* with approval). Meanwhile, as the petition points

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[7] *See* Supreme Court R. 10.1(b), (c). Frequently this Court looks for a conflict in the federal circuits as a test for granting *certiorari*. It is not surprising that there is no federal circuit conflict on the question presented here, as most state-law wrongful discharge lawsuits are filed in state court. The existence of the preemption defense is not a basis for removal. *E.g.*, *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392-93 (1987) (state-law contract claim held not removable to federal court, notwithstanding the possible defense of federal preemption). Thus, the interstate conflict in the state-court decisions on the federal preemption issue should motivate this Court to grant *certiorari*.

out, the California-New Jersey-Connecticut preemption rule flatly conflicts with decisions from New Mexico,[8] Michigan,[9] Colorado,[10] and Wyoming.[11]

II.

THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT

This Court should grant review to resolve the conflict; there should be a uniform national rule. The law of federal preemption by definition should not vary from state to state. That is so for an important practical reason. With the current disarray in the state decisions, there is no level playing field for thrifts in the various states. It is no secret that the world of financial services today is competitive to an unprecedented extent. State (and to

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[8] *Sholer v. Security Fed. Sav. & Loan Ass'n*, 736 F. Supp. 1083, 1085 (D.N.M. 1990) (state implied contract law is preempted by 12 C.F.R. § 563.39, which establishes "the presumption that, absent a written employment contract, the defendant could not have entered into any specific employment relationship with the plaintiff which exceeded the scope of an at-will employment relationship").

[9] *Hawkins v. Peoples Fed. Sav. & Loan Ass'n*, 155 Mich. App. 237, 399 N.W.2d 484, 487-488 (1986) (HOLA and corresponding OTS regulations preempt state law implied contract claims).

[10] *Berry v. American Fed. Sav.*, 730 P.2d 905, 906 (Colo. Ct. App. 1986) (since plaintiff lacked a written, board-approved employment contract, the claim was preempted by 12 C.F.R. § 563.39).

[11] *Dynan v. Rocky Mountain Fed. Sav. & Loan*, 792 P.2d 631, 639 (Wyo. 1990) (federal regulations preempt conflicting Wyoming law regarding employment contracts).

some extent international) borders increasingly are irrelevant. Money flows where the market dictates. Because of the state-by-state inconsistency in preemption law, thrifts in New Jersey, California and Connecticut operate at a competitive disadvantage compared to those in other states.

It is true, of course, that in general states are free to set the rules for businesses that operate within their borders. Contract law, in particular, is an area appropriately left to the states. It is normally up to each state to decide for itself whether or not to be a hospitable place to do business. But an exception exists for federal thrifts. The HOLA was enacted because Congress sought to make a " 'radical and comprehensive response to the inadequacies of existing state systems.' " *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 160 (1982) (citation omitted). Congress decreed that federal law would control " 'the powers and operations of every Federal savings and loan association from its cradle to its corporate grave.' " *Id.* at 145 (citation omitted). In so doing, Congress made clear that one of its primary regulatory objectives was to ensure that savings and loans – and the federal regulators that may have to take them over – are not saddled with unknown and indeterminate obligations. The Regulations were designed precisely to make a savings association's board of directors accountable for maintaining a written record of, and approving, all employment contracts to which an institution is bound. While the Regulations to some extent benefit thrifts themselves, it is important to emphasize that the Regulations also benefit the public by helping to stabilize the thrift industry. The recent crisis in both thrifts and

banks has made clear that taxpayer dollars are at stake; when the industry falters, the taxpayer pays. Thus, a uniform regime of prudent legal rules applicable to thrifts ultimately protects the public.

In this industry, in sum, Congress mandated a uniform federal rule. It now is this Court's task to fashion one.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to grant the petition and reverse the judgment below.

DATED: September 9, 1994

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